NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

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July 9, 2002

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: CS Docket 98-120

Dear Ms. Dortch:

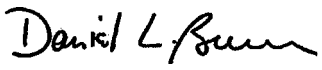
Enclosed for inclusion in the above-captioned digital must carry docket is an analysis prepared for the National Cable & Telecommunications Association by noted constitutional scholar Professor Laurence H. Tribe. Professor Tribe examines the implications under both the First and Fifth Amendments if the FCC were to reverse its interpretation of the "primary video" signal carriage requirement in the 1992 Cable Act so as to require carriage of a broadcaster's *multiple* digital programming streams. He concludes that such a requirement would likely be held unconstitutional – and certainly raises serious constitutional concerns.

According to Professor Tribe, "forcing cable operators to carry multiple video streams of digital broadcasters would abridge the editorial freedom of cable operators, harm cable programmers, and invade the right of audiences to choose what they want to view – all without promoting any of the governmental interests contemplated by Congress in enacting the must-carry rules, or any of the interests approved by the Supreme Court in *Turner I* and *Turner II*." Interpreting the statute to require carriage of multiple streams would multiply the constitutional burden on cable operators. And "once the governmental interest – preservation of over-the-air broadcasting and diversity – is achieved through a limited must-carry obligation of a single broadcast channel, the further burden on speech represented by a broad multicasting carriage requirement becomes constitutionally impermissible."

In addition, mandatory carriage of multiple streams of video programming would result in the permanent, physical occupation of a substantial amount of a cable operator's capacity, raising "substantial issues under the Fifth Amendment's Takings Clause and under the separation of powers." Such a taking of property would violate the Fifth Amendment because "there is no statutory mechanism in the Communications Act that guarantees adequate compensation from any source for the forced carriage of multiple streams of video programming . . . . Nor is there any congressional authorization for compensation from the federal Treasury."

For all these reasons, Professor Tribe concludes that "a broad interpretation of 'primary video' digital carriage obligations would raise serious constitutional questions and should … be avoided by the Commission." Therefore, as NCTA has argued in its Opposition to the Petitions for Reconsideration, the Commission should instead affirm on reconsideration its determination that "primary video" means a "single video programming stream and other 'program-related' content" – an interpretation that is consistent with the plain language and the purposes of the Act *and* the First and Fifth Amendments.

Respectfully submitted,



Daniel L. Brenner

cc: Chairman Michael K. Powell
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Commissioner Kevin J. Martin
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Enclosure